UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION TO DISMISS FOR LACK OF JURISDICTION: PRESIDENT'S MILITARY ORDER OF 13 NOVEMBER 2001 IS INVALID UNDER UNITED STATES AND INTERNATIONAL LAW**
v.	)	
DAVID M. HICKS	)	
	)	**4 October 2004**

The Defense in the case of the *United States v. David M. Hicks* requests that the military commission dismiss all charges for lack of jurisdiction, and states in support of this request:

1. **Synopsis**: Mr. Hicks has been brought before this military commission pursuant to the provisions of the President's Military Order (PMO) of 13 November 2001. Any jurisdiction this military commission has over Mr. Hicks derives solely from the PMO and no other source. However, the PMO is invalid under U.S. law because there exists neither statutory nor common law authority for the President to create this military commission. Neither was this military commission "established by law" as required by international law. Accordingly, this military commission does not have authority or jurisdiction to try Mr. Hicks for any offense.

2. **Facts**: None.

3. **Discussion**:

A: Power to Constitute Tribunals

In his *Military Order — Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* of 13 November 2001 (the PMO), President Bush purported to create this military commission. Constitutionally, power to create a military commission rests with the legislative branch of government; not with the executive branch. Article I of the United States Constitution vests in Congress the exclusive power to constitute "tribunals inferior to the Supreme Court" (i.e. a military commission) and to define and punish offenses "against the Law of Nations. Nevertheless, President Bush asserted that he had authority to create this commission based on the power "vested in him" by the United States Constitution as well as the following two acts of Congress:

- the Authorization for Use of Military Force Joint Resolution (AUMF);[1] and
- sections 821 and 836 of title 10, United States Code (Article 21 and Article 36).

However, none of these authorities specifically authorized the President to convene military commissions for the detainees at Guantanamo Bay. To do so, the President required a specific grant of authority from Congress.

[1] Public Law 107-40, 115 Stat. 224 (2001).

1. The War Power in the US Constitution—The President's powers under Article II are insufficient authority for the President to create a military commission. Article II (2) of the United States Constitution makes the President the Commander in Chief of the Army and Navy, and authorizes him to grant reprieves and pardons for offenses against the United States. Article II, however, does not discuss the creation of tribunals. The power to create military tribunals is vested in the Congress by Article I.

2. The Authorization for Use of Military Force Joint Resolution (AUMF)—The AUMF is concerned solely with the authorization of the use of the United States Armed Forces. Under section 2, entitled "Authorization for use of United States Armed Forces," it states that the President is "authorized to use all necessary and appropriate force" against those responsible for the terrorists attacks that occurred on 11 September 2001, or those who harbored those responsible. It then refers to section 8(a)(1) of the War Powers Resolution, which regulates the President's power to introduce United States Armed Forces into hostilities.

The AUMF certainly authorized military action against those involved in the 11 September 2001 attacks. The Supreme Court has also found that it authorized the detention of enemy combatants. In *Hamdi v. Rumsfeld*,[2] the Court held that the AUMF authorized the detention of enemy combatants captured in Afghanistan. The Court stated that:

> There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident of war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.[3]

The object of the detention was "to prevent a combatant's return to the battlefield." "He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released."[4]

However, the court did not go so far as to authorize the exercise of military criminal jurisdiction over them. The United States military gains such jurisdiction only when acting as an occupying power, or when Congress has granted such jurisdiction specifically by statute.[5] Because the AUMF and the War Powers Resolution make no mention whatsoever of military commissions, Congress has not provided a specific authority for the President to create military commissions.

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[2] ___ U.S. ____, ____,124 S.Ct. 2633, 2640 (2004).

[3] *Id.*

[4] *Id.*

[5] *See* Neal K. Katyal & Lawrence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L. J. 1259, 1284 (2002).

3. Article 21 and Article 36—Article 21 states that the provisions conferring jurisdiction upon courts-martial "do not deprive military commissions . . . of concurrent jurisdiction."[6] This statute is not an affirmative grant of jurisdiction. Rather it is a limitation on the exclusive jurisdiction of courts-martial to those instances when Congress has authorized the use of military commissions. It provides simply that the jurisdiction of courts-martial does not deprive military commissions, when properly convened, of jurisdiction they have over certain offenses defined by statute or by the law of war.

During WWII, military commissions were set up in Hawaii by President Roosevelt, under what was then Article 21. The Supreme Court, in *Duncan v. Kahanamoku*,[7] struck down the commissions because Congress "did not specifically state" or "explicitly declare" that the military could close the civil courts. The Court construed the law in light of "our political traditions and our institution of jury trials in courts of law[,]" traditions that "can hardly suffice to persuade us that Congress was willing to enact a . . . decision permitting such a radical departure from our steadfast beliefs."[8] Accordingly, Article 21 is not an affirmative grant of jurisdiction by Congress for the use of military commissions.

Article 36 states only that the President may prescribe regulations setting out pretrial, trial, and post-trial procedures for military tribunals, including courts-martial and military commissions.[9] Essentially, it amounts to a delegation of power by Congress, to the President, to set the rules for tribunals that have already been established by Congress. The section does not delegate the power to *create* a tribunal. The power to convene a tribunal, such as this military commission, arises only from a specific statute authorizing the establishment of that tribunal.

B: The Right to a Tribunal Established by Law

An essential institutional guarantee of a fair trial is that a criminal case not be adjudicated by a political or executive body, but by a "tribunal established by law." This is provided for in Article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR).[10] Similarly,

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[6] 10 U.S.C. section 821 (2004) reads in its entirety: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

[7] 327 U.S. 303, 324 (1946).

[8] *Id.* at 315-17.

[9] 10 U.S.C. section 836 (2004) reads in its entirety: "(a) Pretrial, trial and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (b) All rules and regulations made under this article shall be uniform so far as practicable." The requirement that the President's procedural rules "may not be contrary to or inconsistent with this chapter" does little to confine the President's discretion, because, with rare exception, the relevant chapter is silent with respect to procedures applicable to military commissions. The procedures that are specified can be fairly characterized as insignificant, especially in comparison to the procedures that are not specified.

[10] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Ratified by the US on 8 June 1992.

Article 75(4) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I)[11] provides that a conviction may only be pronounced by a "regularly constituted court."[12]

"Established by law" denotes a constitution, or other legislation passed by the habitual law-making body, or the common law, delineating the competence of the court. The aim of this requirement is to ensure that tribunals are not established to consider the case of a particular individual or group of individuals.

The European Court of Human Rights has interpreted the phrase "established by law" contained in Article 6 of the *European Convention on Human Rights*.[13] The Court recognized that the central purpose of this requirement is to ensure that judicial organization does not depend on the discretion of the executive, but that it is "regulated by law emanating from Parliament."[14] The law establishing the tribunal must be comprehensive in scope, setting forth the matters falling within the jurisdiction of the court and establishing the organizational framework for the judiciary.

Here, Congress has *not* created the military commission(s) at issue. Rather, the military commission was "created" by section 4(a) of the PMO. It states "[a]ny individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission . . . ." Section 4(b) and (c) then delegate the power to the Secretary of Defense to issue such orders and regulations to appoint one or more military commissions, and provide rules for the conduct of proceedings.

In making this Military Order, the President relied on the Constitution, the AUMF, and sections 821 and 836 of title 10, United States Code. These provisions are insufficient to fulfill this requirement.[15] None of them properly "establish" the commission. Instead, they at most confer limited jurisdiction on military tribunals not yet established by law.

C: Conclusion

Mr. Hicks has been brought before this military commission pursuant to the provisions of the PMO. The jurisdiction of this military commission over Mr. Hicks is derived solely from that

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[11] Opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

[12] The *American Declaration on the Rights and Duties of Man* states in article XXVI states "Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws...": OAS Res XXX, adopted by the Ninth International Conference of American States (1948). Available at <http://www.cidh.oas.org/Basicos/basic2.htm>.

[13] Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[14] *Coeme and Others v. Belgium*, App. Nos. 00032492/96 et al., Eur.Ct.H.Rts., Judgment of 22 June 2000, [98], quoting *Zand v. Austria*, app. no. 7360/76, Eur. Comm'n H.Rts., Commission Report of 12 October 1978, DECISIONS AND REPORTS (DR) 15, pp. 70 and 80. Judgment available at <http://www.worldlii.org/eu/cases/ECHR/2000/249.html>.

[15] Authorization for the Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224 (2001); and ss 821 and 836 of title 10 of the US Code.

PMO. However, the PMO is invalid under United States and international law. Accordingly, this commission does not have jurisdiction to try Mr. Hicks for the offenses charged.

5. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. **Evidence**:

A: The defense reserves the right to request witnesses after reviewing the Government response.

B: Attachments

1. Neal K. Katyal & Lawrence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals* (2002), page 1284.
2. *International Covenant on Civil and Political Rights*, Article 14(1).
3. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, Article 75(4).
4. *American Declaration on the Rights and Duties of Man*, Article XXVI.
5. *Coeme and Others v. Belgium*, European Court of Human Rights (2000), para. 98.

6. **Relief Requested**: The defense requests that all charges be dismissed from this commission.

7. The defense requests oral argument on this motion.

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The Yale Law Journal

Waging War, Deciding Guilt: Trying the Military Tribunals

by
Neal K. Katyal and Laurence H. Tribe

111 YALE L.J. 1259

Volume 111 April 2002 Number 6

Attachment 1 to RE ____

Page 1 of 2

3. *The Differences Between the Roosevelt and Bush Orders*

Our general argument is that Congress must specifically authorize the use of military tribunals before their use is allowed, even for unlawful combatants charged with violations of the laws of war. In *Quirin*, this authorization was the result of several legislative decisions stitched together. *First*, Congress had declared war and had underscored the government's total commitment to the war effort:

> [T]he state of war between the United States and the Government of Germany . . . is hereby formally declared; and the President is hereby authorized and directed to employ the *entire* naval and military forces of the United States and the *resources of the government* to carry on war against the Government of Germany; and, to bring the conflict to a successful termination, *all of the resources of the country* are hereby pledged by the Congress of the United States.[95]

Nothing even close to that World War II authorization, or a wartime emergency in which Congress's consent cannot be obtained, is present today. Significantly, the Resolution passed by Congress several days after the September 11 terrorist attacks permits only the use of "force"; applies only to persons or other entities involved in some way in the September 11 attacks; and then extends only to the "prevent[ion of] . . . future acts of international terrorism against the United States by such nations,

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In another World War II case, the Court faced the issue of the executive's authority to order military tribunals in the Philippines to try violators of the law of war. In *In re Yamashita*, 327 U.S. 1 (1946), General Yamashita of the Imperial Japanese Army was tried and convicted by a military commission ordered under the President's authority. The Court pointed to three executive announcements about the need for such military tribunals and three treaties that were ratified and codified in the United States Code that made what Yamashita did a crime. *Id.* at 10-11, 15-16. *Yamashita* read *Quirin* to permit military tribunals to try offenses against the law of war, but it explicitly tethered its view to a declaration of war. The *Yamashita* Court held that the trial and punishment of enemies who violate the law of war is "an exercise of the authority *sanctioned by Congress* to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its *declaration* until peace is proclaimed." *Id.* at 11-12 (emphasis added); *see also id.* at 12 ("The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power . . . to remedy, *at least in ways Congress has recognized*, the evils which the military operations have produced." (emphasis added)). The Court went on to note that its constitutional holding was limited to that circumstance only, and that "it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied." *Id.* at 23.

95. Joint Resolution of Dec. 11, 1941, Pub. L. No. 77-331, 55 Stat. 796, 796 (emphasis added). In *Quirin*, total war was involved, for the Nazi saboteurs "were *invaders*, their penetration of the boundary of the country, projected from the units of a hostile fleet, was in the circumstances of total war *a military operation*, and their capture, followed by their surrender to the military arm of the government, was a continuance of the same operation." CORWIN, *supra* note 54, at 120.

Office of the High Commissioner for Human Rights

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

***entry into force* 23 March 1976, in accordance with Article 49**

Attachment 2 to RE
Page 1 of 2

Article 14 ***General comment on its implementation***

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Attachment 2 to RE ____

Page 2 of 2

fulltext

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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Attachment 3 to PE ____

Page 1 of 2

Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
(a) violence to the life, health, or physical or mental well-being of persons, in particular:
(i) murder;
(ii) torture of all kinds, whether physical or mental;
(iii) corporal punishment; and
(iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
(c) the taking of hostages;
(d) collective punishments; and
(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt;
(g) anyone charged with an offence shall have the right to examine, or have examined,

Attachment 3 to RE
2 of 2

AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

(Approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948)

Attachment 4 to RE ____

Page 1 of 2

Article XXVI. Every accused person is presumed to be innocent until proved guilty.

Right to due process of law.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

Attachment 4 to RE ____

Page 2 of 2

COEME AND OTHERS v. BELGIUM (32492/96) [2000] ECHR 249 (22 June 2000)

SECOND SECTION

CASE OF COËME AND OTHERS v. BELGIUM

(Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96)

JUDGMENT

STRASBOURG

22 June 2000

Attachment 5 to RE ____

Page 1 of 2

1. The case of Mr Coëme

96. Like the other applicants, Mr Coëme submitted that the rules governing the procedure to be followed by the Court of Cassation were established neither by statute nor by the Constitution. He argued on that basis that the Court of Cassation had acted as both legislator and judge at the same time, in breach of Article 6 § 1 of the Convention. Any judicial authority had to be subject to procedures intended to guarantee the integrity of its decisions to the persons within its jurisdiction and to safeguard the right to due process, a principle which the House of Representatives had fully understood in 1865. The fact that there was no statute governing procedure had in the present case led the Court of Cassation to establish an *ad hoc* procedure, making up for Parliament's failure to legislate. By laying down the applicable procedural rules itself, even by analogy, the Court of Cassation had manifestly disregarded the principle of the separation of powers as regards enactment and application of the criminal law. Even though, by a process of elimination, the procedure followed by the Court of Cassation could not be anything other than the procedure laid down for the criminal courts, this was not sufficient to satisfy the requirement of an accessible and foreseeable procedure.

According to Mr Coëme, this also constituted a breach of Article 6 § 2 of the Convention, in so far as that provision laid down the principle "*nullum judicium sine lege*".

97. The Government submitted that it could not be inferred that the procedure before the Court of Cassation was not laid down by domestic law merely because the procedure to be followed for the trial of ministers was laid down neither by the Constitution nor by any implementing legislation. The procedure to be followed was the procedure which existed for the ordinary criminal courts, and this was perfectly foreseeable in the light of the teachings of case-law and legal theory, and also on account of the fact that the other three types of procedure – those laid down for the assize courts, juvenile courts and military courts – were obviously not applicable. The Court of Cassation had therefore not acted as an *ad hoc* legislature, nor had it gone beyond the bounds of a reasonable interpretation of existing law by applying the procedure of the ordinary criminal courts, while introducing a number of modifications made necessary by the constitutional requirement that it had to sit as a full court.

98. The Court observes in the first place that the Convention "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive" (see the Artico v. Italy judgment of 13 May 1980, Series A no. 37, pp. 15-16, § 33). According to the case-law, the object of the term "established by law" in Article 6 of the Convention is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament" (see Zand v. Austria, application no. 7360/76, Commission's report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80). Nor, in countries where the law is codified, can organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.

99. A tribunal "is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner" (see the Belilos v. Switzerland judgment of 29 April 1988, Series A no. 132, p. 29, § 64). It must also satisfy a series of other conditions, including the independence of its members and the length of their terms of office, impartiality and the existence of procedural safeguards. There is no doubt that the Court of Cassation, which in Belgian law was the only court which had jurisdiction to try Mr Coëme, was a "tribunal established by law" (see, *mutatis mutandis*, Prosa and Others v. Denmark, application no. 20005/92, Commission decision of 27 June 1996, unreported).

Attachment 5 to RE ____

Page 2 of 2